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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 610

CHARLES W. STRONG, TRADING AS STRONG MANUFACTURING COMPANY,

Petitioner,

vs.

FRANCIS R. SMITH, COLLECTOR OF INTERNAL REVENUE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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INDEX

Subject Index of Matter and Brief

	Page
Citations	1
Statute Involved	1
Jurisdiction	1
Questions Presented	2
Statement of Matter Involved	2
Argument	3

Citations

Allens v. *Regents*, 304 U. S. 439, 58 S. Ct. 980, 82 L. Ed. 1448, 1938	4
Concentrate Mfg. Corp. v. *Higgins*, 2 Cir. 1937, 90 F. 2d 439, certiorari denied 302 U.S. 714, 58 S. Ct. 33, 82 L. Ed. 551	4
Klotz, et al. v. *U. S. Court of Claims* (1935), 9 F. Supp. 618	4
Mazzella v. *Yoke*, 70 F. Supp. 463	4
Miller v. *Nut Margarine Co.*, 284 U. S. 498, 52 S. Ct. 260, 76 L. Ed. 422, 1932	4
Midwest Haulers, Inc., et al. v. *Brady*, 6 Cir. 1942, 128 F. 2d 496	4
Frederick Hart & Co., Inc. v. *Recordgraph Corporation*, 3 Cir. 1948, 169 F. 2d 580	5

Statute Involved

Internal Revenue Code:

> Sec. 3653. Prohobition of Suits to Restrain Assessment or Collection.
>
> (a) Tax.—Except as provided in sections 272 (a), 871 (a) and 1012 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.
>
> (26 U.S.C. 1946 ed., Sec. 3653).

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Fred M. Vinson, Chief Justice of the United States, and The Associate Justices of the Supreme Court of the United States:

Jurisdiction

This is an appeal from a final judgment of the United States Court of Appeals, for the Third Circuit, dismissing the taxpayer's complaint praying that the Collector of Internal Revenue, Philadelphia, Pennsylvania, be restrained from assessing and collecting an alleged income tax deficiency. The judgment of the Court of Appeals was entered January 10th, 1950. Notice of Appeal was filed January 25th, 1950. Jurisdiction is conferred on this Court

by Sections 237 (b) and 240 (a) of the Judicial Code, as amended by the Act of February 13th, 1925; also Act of March 8th, 1934, and Rules of Practice and Procedure.

Questions Presented

1. Does the Complaint state facts sufficient to bring the taxpayer within any exception to the prohibition against suits to enjoin collection of Federal taxes, provided by Section 3653 of the Internal Revenue Code?

2. Can an Affidavit filed in support of a Motion to Dismiss and for Summary Judgment be treated as proof contradictory to well-pleaded facts in the Complaint and uncontradicted testimony adduced at a hearing on the merits?

Statement of Matter Involved

The complaint (R. 2a-4a) alleges that the taxpayer was engaged in business at Philadelphia, Pennsylvania, under the style of Strong Manufacturing Company; that the taxpayer and his wife, Martha H. Strong, were, during 1944, the year here involved, operating Strong Manufacturing Company as partners; that the Commissioner of Internal Revenue declined to recognize the partnership between the taxpayer and his wife as valid, and a revenue agent proposed, as a result of this determination, a deficiency in income taxes against the taxpayer in the amount of $28,086.48; that at the time this deficiency was proposed it was agreed that the resulting overassessment in favor of the taxpayer's wife would be applied to the resulting deficiency against the taxpayer; that, at the time the deficiency was assessed against the taxpayer, he and his wife were living together as man and wife but subsequently they separated and were divorced; that the Commissioner refunded to the taxpayer's wife the sum of $20,279.82, the amount of the resulting overassessment; that to require the

taxpayer to pay the entire amount of the deficiency against him without crediting the overassessment in favor of his wife, refunded to her, will be taking his property without due process of law and that the action of the Commissioner is oppressive, unreasonable and unconscionable.

The Collector moved to dismiss (R. 5a) upon the grounds that the Complaint failed to state a cause of action, and that the District Court was without jurisdiction. An Affidavit, executed by Counsel for the Collector, denying the alleged off-setting agreement of the taxpayer's wife, was filed in support of the Motion to Dismiss and for Summary Judgment (Appellee 10).

Upon hearing the taxpayer's Motion for a Preliminary Injunction the Court (R. 7a-37a) took evidence in support of the allegations of the complaint, and reserved decision as on final hearing (R. 37a) upon the Collector's Motion to Dismiss (R. 29a).

The District Court subsequently entered a minute (R. 38a) that "The Motion must be granted under Section 3653 (a) of the Internal Revenue Code." Judgment accordingly was entered (R. 39a) on February 14th, 1949.

On appeal, the judgment of the District Court was affirmed Per Curiam by the United States Court of Appeals, for the Third Circuit, on January 10th, 1950, and the following Opinion filed of record: "Examination of the Briefs and Record and consideration of the oral argument in this case convince us that no error was committed by the Court below. Accordingly the judgment appealed from will be affirmed."

Argument

Section 3653 (a) of the Internal Revenue Code prohibits suits to restrain assessment or collection of any tax, except as provided in Sections 272 (a), 871 (a) and 1012 (a); and, for purpose of this appeal, it is conceded that the in-

stant fact issue falls outside the pale of any of the stated exceptions.

Despite the prohibition of the Statute, the Courts have created well recognized exceptions in extraordinary circumstances where the legal remedy afforded a taxpayer is clearly inadequate, or the tax partakes of the nature of a penalty. *Mazzella* v. *Yoke,* 70 F. Supp. 463; *Miller* v. *Nut Margarine Co.,* 284 U.S. 498, 52 S. Ct. 260, 76 L. Ed. 422, 1932; *Allens* v. *Regents,* 304 U.S. 439, 58 S. Ct. 980, 82 L. Ed. 1448, 1938.

There is no universal formula for conferring equitable jurisdiction upon the Court in extraordinary circumstances. However, it has been held that the complainant must make out a case of gross and indisputable oppression, without adequate remedy at law. *Concentrate Mfg. Corp.* v. *Higgins,* 2 Cir. 1937, 90 F. 2d 439, certiorari denied 302 U. S. 714, 58 S. Ct. 33, 82 L. Ed. 551.

It is well settled that one taxpayer may consent to have a refund due him applied in satisfaction of the tax liability of another taxpayer. *Klotz et al.* v. *U. S. Court of Claims* (1935), 9 F. Supp. 618. The instant fact issue is whether or not the taxpayer's wife consented to offset a refund due her in satisfaction of a deficiency assessment against the Petitioner.

The record discloses that the complaint and testimony establish the fact issue; and that the only contradiction is an information Affidavit executed by Counsel and filed on behalf of the Collector.

The allegations in the Complaint, as corroborated by the testimony, must be taken as true, for purpose of decision on the Motion to Dismiss. *Midwest Haulers, Inc., et al.* v. *Brady,* 6 Cir. 1942, 128 F. 2d 496. Further, the Affidavit filed in support of the Motion to Dismiss may not be considered as proof contradictory to the facts in the Com-

plaint and the testimony adduced at the preliminary hearing. *Frederick Hart & Co., Inc.* v. *Recordgraph Corporation*, 3 Cir. 1948, 169 F. 2d 580.

The Commissioner's refund to the taxpayer's wife, in derogation of the offsetting agreement, has placed the fund beyond the legal and jurisdictional reach of the taxpayer, and has deprived him of property without due process of law. It therefore follows that to permit the Government to now collect the deficiency assessment from the taxpayer, without any offset, would be oppressive and would result in double taxation.

It is therefore submitted that the Complaint in this case alleges facts bringing the cause of action within the scope of recognized equitable jurisdiction, and the Court below erred in ordering its dismissal.

Respectfully submitted,

FILINDO B. MASINO,
Attorney for Petitioner.